SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1961

No. 666

LEROY ALPHONSO HAITH,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Supreme Court of the United States:

Petitioner, a citizen of the United States, petitions this Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to review the final judgment of that Court entered on December 16, 1961, which judgment affirmed and sanctioned the final judgment of the United States District Court for the Eastern District of Virginia, which was a manifest departure from the usual and accepted course of judicial procedure, and on account thereof Petitioner verily believes an exercise of this

Court's power of supervision is essential to the fulfillment of fundamental justice under the law.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Decided December 16, 1961)

HAYNSWORTH, Circuit Judge:

Convicted of possession and concealment of contraband whisky, the defendant contends seizure of the whisky was in violation of his Fourth Amendment rights. At the trial he conceded there was probable cause to search the trunk of his automobile where the whisky was stored, but contended a search warrant could have been obtained and was prerequisite to the search. On appeal, he has reversed his position, conceding a warrant was not required if there was probable cause for the search, but contending there was no probable cause. We find no merit in either contention.

From the record it appears that federal agents were looking for the defendant in the vicinity of his home in Richmond, Virginia, for the purpose of serving a warrant for his arrest, issued in Philadelphia, Pennsylvania, where he was charged with participation in a conspiracy to violate the revenue laws relating to whisky. Earlier in the evening they stopped a Cadillac automobile which the agents knew belonged to the defendant and which they were informed he used for the transportation of whisky, but he was not in the Cadillac at the time, and, apparently, neither that car nor the driver was detained. Later the agents saw a Pontiac automobile, which the agents had observed on previous occasions, approaching the defendant's residence, near which it was brought to a stop at the curb. The agents,

following in an automobile, brought their vehicle to a stop some distance behind the Pontiac and observed the defendant as he got out of the Pontiac and entered his residence. The agents observed that the rear of the Pontiac was very low, though its rear springs were reinforced with air lift devices. Along the crack between the lid of the trunk and the body of the Pontiac automobile they recognized the odor of moonshine whisky, from which the agents concluded that the load in the trunk of the car was illicit whisky.

Some of the agents proceeded to the front door of the defendant's house. They were admitted. They arrested the defendant under the arrest warrant which they had. When they asked for the keys to the Pontiac, the defendant produced a key to the ignition, but denied he had a key to the lock of the trunk. One of the agents then removed the rear seat of the Pontiac, pushed aside a piece of cardboard behind the back of the rear seat and removed a half gallon jar from one of several cardboard cartons. This jar was opened and the agents concluded from its odor that it contained moonshine whisky. The defendant then produced a key to the trunk of the car. When the trunk was opened, it was found that it contained some ninety gallons of illicit whisky in half gallon jars packed in cardboard cartons.

Clearly, there was probable cause for the search. The agents, knowing of the defendant's reputation as a bootlegger, observing the reinforced springs of the Pontiac and their compression under the weight of a heavy load and smelling the odor of moonshine whisky coming from the trunk of the car, had abundant reason to believe that the trunk contained illegal whisky. Probable cause for the search of an automobile has been found to exist when the information in the possession of the arresting officers

pointed much less certainly to the presence of contraband. Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543; Husty v. United States, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629; Brinegar v. United States, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879; Godette v. United States, 4 Cir., 199 F. 2d 331; Ray v. United States, 4 Cir., 255 F. 2d 473. From what the officers knew and observed here, the basis for their belief that the trunk of the automobile contained contraband whisky was more than adequate.

The defendant here does not question the principle. Contrary to his stipulation at the time of trial that there was probable cause for the search, he seeks to minimize the evidence, to ignore some of it and to view each piece in isolation. Pointing to his stipulation at the trial that he was a known bootlegger, for instance, the defendant says that there was no evidence that his reputation was known to the arresting officers. The stipulation is not explicit in that respect, but the record affirmatively shows that the arresting officers had a warrant for his arrest for another whisky offense and had information about his use of his Cadillac in transporting whisky. From such evidence it sufficiently appears that his stipulated reputation was known to the arresting officers.

The defendant suggests that the officers had no right to conclude from the odor of whisky coming from the trunk of the car that the whisky was illicit and without the requisite stamps. This, indeed, might be true, under some circumstances, but when the odor is that of moonshine whisky, when it comes from the trunk of an automobile of a known bootlegger and the trunk is obviously heavily loaded, the possibility that the whisky was lawfully made, bottled and stamped and its possession lawful was remote.

There was probable cause for the search of the automobile.

When the motion to suppress evidence of the whisky was made at the trial, the defendant conceded the officers had probable cause for their belief there was contraband whisky in the trunk of the automobile. He contended a search warrant was requisite for it became practical to obtain one after the defendant's arrest pursuant to the arrest warrant and his delivery to the officers of a key to the automobile ignition switch. He says, in effect, that having seized the automobile, some of the officers should have remained with it to protect the security of the seizure,[1] while others repaired to the office of a United States Commissioner to obtain a warrant to search the seized vehicle.

This was not a search of a building where a warrant may be requisite whatever the basis of the officers' belief that contraband is present within it.[2] Nor are we concerned with the permissible limits of seizures and searches incident to a lawful arrest,[3] for legality of the seizure and search of the automobile is not dependent upon a conclusion that they were incident to the lawful arrest of the defendant under the warrant charging him with an earlier offense. The case is within the well-established rule that a warrant is not required for the search of a movable vehicle if the officers have reason-

[1] The defendant, under arrest, could not have moved the vehicle until and unless he was discharged on bail. Meanwhile, however, others may have had other keys to the ignition switch or, with or without such keys, could have moved the vehicle unless the officers were prepared to protect their possession of the seized automobile.

[2] See Chapman v. United States, 365 U. S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828.

[3] See United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653, overruling Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663, to the extent Trupiano holds the requirement of a warrant for a search incident to a lawful arrest turns on a question of practicality.

able cause to believe that it contains contraband. Without a warrant they act at their peril, but they justify their conduct and square their search with the requirements of the Fourth Amendment if they can show they acted with probable cause.[4]

The defendant is not aided by his attempt to fragment the seizure and the search, conceding the former was lawful but denying the legality of the latter solely because, the seizure having been accomplished, the officers could have postponed their search until they had obtained a warrant.

In all of the automobile cases, once the officers have seized the vehicle and obtained exclusive possession of it, it becomes practical, in a sense, to postpone the search until a warrant has been obtained. Probable cause being present, however, the cases unanimously sustain the legality of an undelayed search, and none suggests the distinction the defendant urges.

The necessity of the situation is not limited to the seizure alone, for the seizure and the search are of a part. There is substantial simultaneity between them. Here, as in most such cases, the seizure is tentative and temporary until search confirms the presence of contraband.

No purpose would be served by a requirement that the seizure and the search be separated in time and space, or that the seizure be prolonged and made less conditional in order to provide the officers with an opportunity to obtain a search warrant.

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[4] Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790; Husty v. United States, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629; Brinegar v. United States, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879; Bess v. United States, 4 Cir., 49 F. 2d 884; Godette v. United States, 4 Cir., 199 F. 2d 331; Harman v. United States, 4 Cir., 210 F. 2d 58; Ray v. United States, 4 Cir., 255 F. 2d 473.

Moreover, if the seizure be lawful, as it concededly was here, and the officers have obtained exclusive possession of the vehicle, forfeited to the United States because of its use in violation of the revenue laws, and of its contraband contents, the former possessor has no remaining rights for which the Fourth Amendment lends protection. There appears no good reason why officers may not inventory the contents of an automobile when they are lawfully in possession of the vehicle and of its contents without having to obtain a warrant to search what they already lawfully possess.

The defendant received a general sentence upon a conviction upon each of two separate counts. The sentence imposed was within the permissible maximum upon conviction upon either count. Separate sentences upon each count are preferable, but a general sentence upon both counts, which is permissible upon conviction on either count, is unobjectionable on appeal.[3]

Finally, the defendant complains the record does not affirmatively show that the indictment against him was returned in open court, or that the District Attorney affirmatively consented to the defendant's waiver of trial by jury. The transcript of the proceedings does show that the indictment was returned in open court, however, and the transcript of the trial proceedings shows that following a conference of the attorney for the defendant and the United States Attorney at the Bench, the Judge announced that counsel for the defendant and counsel for the United States had agreed to discharge the jury and that the case would be

[3] United States v. Trenton Potteries, 273 U. S. 392, 47 S. Ct. 377, 71 L. Ed. 700; Barenblatt v. United States, 360 U. S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115; Robles v. United States, 9 Cir., 279 F. 2d 401.

tried to the court, after which the defendant affirmatively acknowledged his approval of the discharge of the jury. The United States Attorney did not affirmatively state his agreement on the record, but that sufficiently appears from the statement of the Court, to which the United States Attorney made no exception.

Affirmed.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

It is respectfully submitted that the Court below has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the departure of the District Court for the Eastern District of Virginia from such proceedings as to call for an exercise of this Court's power of supervision.

On December 16, 1961, the opinion and final order of the United States Court of Appeals for the Fourth Circuit was rendered herein.

THE QUESTIONS HEREIN PRESENTED FOR REVIEW

(1) The Federal Agents Searched and Obtained Evidence Upon Which Appellant's Conviction Was Based in Violation of the Fourth Amendment.

(2) The Attorney for the Government Did Not Consent to Waiver of a Trial by Jury.

(3) The Record Does Not Show That the Indictment Against the Appellant Was Returned by the Grand Jury in Open Court.

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Leroy Alphonso Haith, the appellant was convicted in the United States District Court for the Eastern District of Virginia, at Richmond, upon indictment containing two counts and in consequence thereof was sentenced to a term of two years' confinement.

The first count of the aforesaid indictment charged appellant had in his possession ninety gallons of distilled spirits of which the containers did not have affixed thereto a stamp evidencing a tax had been paid, with intent to defraud the United States in violation of Sections 5205(a)(2) and 5604(a)(1), Title 26, U.S.C.A.

The second count charged concealment of the aforesaid distilled spirits in violation of Section 5601(a)(12) of Title 26, U.S.C.A.

Again a portion of the evidence was heard in the Court below by the jury trying the case, such jury was discharged at the request of the appellant.

Thereupon the appellant waived trial by jury, and was tried by the Honorable Oren R. Lewis, District Judge, under his plea of "Not Guilty."

A stipulation of facts was allowed by Judge Lewis in lieu of the witnesses testifying. Such stipulation meets the requirement of Law. *Diaz* v. *United States*, 32 S. Ct. 260; *De La Maza* v. *U. S.*, 9th Cir., 215 Fed. (2d) 138.

The stipulation of facts follows:

> Whereupon, counsel for the defendant and the Government stipulated that the defendant was arrested by a lawful warrant; that the 1960 Pontiac automobile was in the possession and under the control of the de-

fendant; that the defendant, a known "bootlegger", was then being followed by Federal agents and United States Marshals for the purpose of serving the aforesaid lawful arrest warrant; that he was seen parking the 1950 Pontiac twenty-five feet from the front door of his home; that the defendant got out of the said automobile, went into his home, where he was immediately arrested; that the said automobile was observed to be overloaded; that it was equipped with supplemental air-cushioned springs and that a strong odor of corn liquor emanated from the trunk thereof and was detected as such by one of the Federal agents; that the defendant was asked for the keys to the automobile; that he came out to the car and gave the Federal agents keys which fit the ignition, but did not fit the trunk of the car; that the defendant was asked for the keys to the trunk and he stated that he did not have them.

Whereupon, one of the Federal agents took out the back seat of the automobile and punched a hole in the cardboard, reached in the trunk section and took out a half-gallon jar containing corn liquor. The defendant then gave the Federal agent the key to the trunk. The trunk of the said automobile was then opened by the agent in the presence of the defendant. Approximately 90 gallons of corn liquor was found therein.

It was further stipulated by the defendant that the liquid found was alcoholic and did not have the necessary Government revenue stamps thereon and that the Government agents had probable cause for the search of the automobile at the time of the said search.

The defendant concedes that the evidence before the Court is sufficient to convict the defendant of the charges laid in the indictment, if the evidence obtained as a result of the search and seizure is admissible.

In support of his motion to suppress the evidence, the defendant contends that even though the search was made immediately following a lawful arrest, and that the agent had reasonable and probable cause to search the automobile, the search and seizure in this

case is illegal because the agent failed to obtain a search warrant, when he had plenty of time to so do.

The defendant was under arrest; his home was surrounded by Federal agents; and his automobile was parked and could not have been moved. He had no chance of escape and the corn liquor could not have been removed or destroyed.

While after argument of the case in the United States Court of Appeals for the Fourth Circuit, the transcript of the Court Reporter relating to the proceedings and evidence adduced before the jury was transmitted to said Appellate Court for its scrutiny and consideration it is our contention that the matter contained in the Reporters transcript herein is no part of the record and that this case must be adjudged and determined solely upon the stipulation of the fact fairly entered into by the appellant and the attorney for the Government.

ARGUMENT

I.

The Federal Agents Searched and Obtained the Evidence Upon Which the Convictions Are Based in Violation of the Fourth Amendment.

The Court of appeals in its opinion said: "This was not a search of a building where a warrant may be requisite whatever the basis of the officers' belief that contraband is present within it." Citing *Chapman* v. *U. S.*, 365 U. S. 610, 81 S. Ct.

In Chapman, the enforcement officers noted a "strong odor of mash" about the house.

However, the Court said "we think it must be concluded here, as it was in Johnson, that if the officers in this case

were excused from the constitutional duty of presenting their evidence to a Magistrate, it is difficult to think of a case in which it would be required. Citing *Lustig v. U. S.*, 338 U. S. 74; *U. S. v. Rabinowitz*, 339 U. S. 56; *U. S. v. Jeffers*, 342 U. S. 48; *James v. U. S.*, 357 U. S. 493.

In *Taylor v. U. S.*, 286 U. S. 1 Federal Agents had received "complaints" respecting activities at a certain garage in Baltimore and decided to investigate. As they approached the garage they got the odor of whiskey coming from within. Looking through a small opening, they saw a number of cardboard cases although they broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him.

In condemning that search and seizure, the Court said that the officers "had abundant opportunity to obtain a warrant and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no possibility of a material change in the situation during the time necessary to secure such warrant moreover a short period of watching would have prevented any such possibility."

The Court further said that "prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence above does not strip the owner of a building of constitutional guarantees against unreasonable search."

The Court concluded that in any view, the action of the agents was inexcusable and the seizure unreasonable.

In *Johnson* v. *U. S.*, 333 U. S. 10, Narcotic agents while in the hallway of a hotel, recognized a strong odor of burning opium coming from a particular room.

Without knowing who was occupying the room, they knocked and after some delay, the door was opened. The agents then entered the room and told the occupant, "to consider herself under arrest, because he was going to search the room." The search produced incriminating opium and smoky apparatus which was warm from recent use.

The District Court refused to suppress that evidence and admitted it over defendant's objection at the trial and he was convicted. In reversing the Court said:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the often competitive enterprise of ferreting out crime. . . . Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's home secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of a search is as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

We maintain that the case of this petitioner is clearly governed by the foregoing cases; and that the enforcement agents had no more right to search his automobile without a warrant, under the facts and surrounding circumstances herein disclosed by this record than they had to search his

home under a similar set of suspicious circumstances.

There are no exceptional circumstances herein in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate warrant for search may be dispensed with.

The rule of peculiar urgency has no application in this case.

The language in *Carroll* v. *U. S.*, 267 U. S. 132, to-wit:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant may be obtained, and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle may be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

This principle is also not applicable to the facts in the case of the within petitioner.

In the agreed stipulation that appears in the opinion of the District Judge the following appears:

> "The defendant was under arrest; his home was surrounded by Federal Agents; and his automobile was parked and *could not have been moved.* He had no chance of escape and the corn liquor could not have been removed or destroyed."

Clearly, there was no possibility that the automobile of petitioner, would be quickly moved out of the locality or jurisdiction.

The officers surrounding the automobile of the petitioner "had abundant opportunity" to obtain a warrant and to proceed in an orderly way even after the odor of "corn whiskey had emphasized their suspicions".

We submit that at the least, the right to search the automobile of petitioner should have been decided by a Judicial Officer and not by Government Enforcement agents.

The right of privacy of a citizen in respect to his automobile is just as secure under the Fourth Amendment as his right to privacy in a house or building he may maintain; and the motor vehicle (not subject to being moved); but stationary and incapable of being moved or conveyed away, in respect to search is governed by the law and rules pertaining to the non movable house or building; so often discussed in the cases pertaining to unlawful searches and seizures.

The foregoing language used in *McDonald* v. *U. S.*, 335 U. S. 451, governs the case of appellant:

> "The defendants were not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave. Nor was the property in the process of destruction nor as likely to be destroyed. As the opium paraphernalia in the *Johnson* case. Petitioners were briefly engaged in their lottery venture. No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But these reasons are no justification for by passing the constitutional requirement.
>
> "We are not dealing with formality. The presence of a search warrant serves a high function.
>
> "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe haven for illegal activities.

> It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law."

As said by the Court of Appeals in its opinion "nor are we concerned with the permissible limits of seizures and searches incident to a lawful arrest, for legality of the seizure and search of the automobile is not dependent upon a conclusion that they were incident to the lawful arrest of the defendant under the warrant charging him with an earlier offense." Citing *U. S. v. Rabinowitz*, 339 U. S. 56, 70 S. Ct. 430.

The foregoing is correct as the "stipulation" by virtue of which we are bound, and the warrant upon which the defendant was arrested, may have as far as we know charged violation of any one of the numerous offenses denounced by Federal Law.

The transcript shows that the warrant upon which the petitioner was arrested was for a whiskey offense. Alleged to have been committed in another jurisdiction; and, not even casually related to the transportation of illegal ardent spirits in the Pontiac automobile herein searched by the arresting officers.

There is nothing in the record to establish that the enforcement officers had any reason to believe that the defendant used the "Pontiac" for the transportation of the illegal liquor.

There was no way of the officers determining whether the odor of corn whiskey coming from the trunk of the car emanated from corn whiskey lawfully acquired or illegal corn whiskey.

In *Byrd v. State*, Fla. 80 Sou. 2nd 694, the Court held that although the officers said whiskey dripped from defendant's truck the dripping of the whiskey did not give

them probable cause to believe that the truck contained contraband whiskey.

The fact that the trunk of defendant's car was obviously heavily loaded in no way adds to or enhances the theory of probable cause asserted in the opinion of the Court of Appeals.

We submit that this record does not disclose grounds sufficient to form a predicate for a magistrate issuing his warrant for a search of the automobile of the petitioner, much less, the action of the enforcement officers in carrying out an enforced search, without any warrant at all.

The fact that the attorney for the appellant at his trial therein stipulated that probable cause existed for the search of the automobile does not effect the determination of this case as the record of the case establishes "plain error" on the part of the District Judge in adjudging that probable cause existed for the search of defendant's car. Rule 52B. Federal Rules of Criminal Procedure; *Benton* v. *U. S.*, 4th Cir. 80 Fed. (2nd) 102; *Smith* v. *United States*, 4th Cir. 106 Fed. (2d) 726.

We submit that the District Court committed reversible error in its failure to sustain the motion to "suppress the evidence" obtained in violation of the Fourth Amendment; and, that the United States Court of Appeals for the Fourth Circuit committed reversible error in sustaining the judgment of the District Court.

II.

The Attorney for the Government Did Not Consent to Waiver of a Trial by Jury

A District Judge only has jurisdiction to hear and determine a criminal case where the accused and the attorney for

the Government expressly consent to the waiver of a Jury.

As far as the record in this case goes, the attorney for the Government may have objected to the trial of the appellant without a Jury.

That the attorney for the Government consented to the trial of the appellant without a jury must affirmatively appear of record. Mere silence on the part of the attorney for the Government is not enough. He must expressly consent to the waive of a Jury and it must appear on the face of the record.

While the record clearly shows that the appellant expressly consented to a waiver of a Jury, nowhere does it appear that the attorney for the Government consented to such a waiver.

The docket entries of October 28, 1960, follows:

Trial proceedings—Lewis, J.: Appearances: defendant with counsel, U. S. Attorney and a jury. Issue joined. Jurors sworn and examined on voir dire. Jury impaneled and sworn to try issue. Witnesses excluded. Stipulation dictated into record. Government adduced evidence. Defendant advised Court he waives his right to a trial by jury and agreed to the Court's dismissal of the jury. Jury discharged. Evidence concluded. Motion to suppress argued. Court takes under advisement. (Petitioner's Appendix p. 11 filed in Court below).

In the opinion of the District Judge the following appears:

> "Upon hearing a portion of the Government's evidence, the defendant, in person, and with the consent and advice of his counsel, moved to discharge the Jury."

The motion was granted and the Jury was dismissed (Petitioner's Appendix p. 3 filed in Court below).

Whereupon, counsel for the defendant and the Govern-

ment stipulated, etc. (Petitioner's Appendix p. 3 filed in Court below).

Therefore, from the foregoing it may be readily observed that the attorney for the Government did not consent to the waiver of a Jury.

In *Patton* v. *U. S.*, 50 S. Ct. 253, the Court said:

> "Not only must the right of the accused to a trial by a constitutional jury be zealously preserved, but the maintenance of the Jury as a fact finding body in criminal cases is of such importance and has such a place in our tradition, that, before any waiver can become effective, the consent of Government Counsel and the sanction the Court must be had, in addition to the express and intelligent consent of the defendant."

See *Adams* v. *U. S.*, 63 S. Ct. 605.

In *Gilligan's* case, 99 Va. 816, the Court said:

> "The contention of the prisoner is, first, that a verdict upon an indictment for a felony must be rendered by the Jury in open Court in the presence of the prisoner, and recorded by the Court; that these essential facts must appear from an inspection of the record, and no intendment will supply their omission, or the omission of any one of them; that the maxim omnia prae sumuntur rite et solemniter esse acta has no application to records made in trials for felony, and that Courts cannot resort to any presumption to supply the omission from the record of that which should appear by the record."

In *Pointer* v. *U. S.*, 14 S. Ct. 410, the Court said:

> "While the record of a criminal case must state what will affirmatively show the offense, the steps, without which the sentence cannot be good, and the sentence itself, all parts of the record are to be interpreted to-

gether, effect being given to all, if possible, and a deficiency at any place may be supplied by what appear at another."

Section 8 of the Constitution of Virginia provides:

"In criminal cases, the accused may plead not guilty, and with his consent and the concurrence of the Commonwealth's Attorney and of the Court entered of record, he may be tried by a smaller number of jurors, or waive a jury. In case of such waiver, or plea of guilty, the Court shall try the case."

In *Catlett* v. *Commonwealth*, 198 Va. 505, the record was as follows:

"Thereupon said Hampton Catlett in person, waived his right to a trial by Jury and requested the Court to hear all matters of Law and facts in the case, and thereupon the Court proceeded to hear all of the evidence in the case, both on behalf of the Commonwealth and on behalf of the defendant."

In respect to the above order the Court said:

"However, we cannot draw by necessary inference from the order that the commonwealth attorney concurred in the waiver and request if the defendant, or that such concurrence, it had, was entered of record, as required by the Constitution."

The Court of Appeals in its opinion had the following to say:

"The transcript of the trial proceedings shows that following a conference of the attorney for the defendant and the United States Attorney at the Bench, the Judge announced that counsel for the defendant and

counsel for the United States had agreed to discharge the Jury and that the case would be tried by the Court, after which the defendant affirmatively acknowledged his approval of the discharged of the Jury.

"The United States Attorney did not affirmatively state his agreement on the record; but that sufficiently appears from the statement of the Court, to which the United States Attorney made no exception."

No one knows from the record itself whether or not the United States Attorney waived a jury.

He may have resorted to mere silence on the subject of the waiver of a duly constituted jury, and the District Judge may have erroneously construed his silence as a waiver of trial by a Jury.

The record must show an affirmative "waiver" on his part. Presumption cannot be resorted to. *Gilligan's* case, *supra*.

Accordingly, *Patton* v. *U. S.*, *supra*, expressly holds that the Attorney for the Government must consent to the waiver of a Constitutional Jury, and *Pointer* v. *U. S.*, *supra*, declares that the record of a criminal case must state what will affirmatively show the steps, without which the sentence cannot be good, it necessary follows that in the case of the appellant reversible error exists, as the record does not show the consent of the attorney for the Government to a waiver of a jury.

III.

The Record Does Not Show That the Indictment Against the Appellant Was Returned by the Grand Jury in Open Court.

In *Reniger* v. *U. S.*, Fourth Circuit, 172 Fed. 646, it is definitely held that the record must show that an indictment

must be carried into open Court in the presence of the Judge by the entire Grand Jury and the fact recorded.

The Court quoted with approval, *Commonwealth v. Cawood*, 2 Va. Cases 541, decided 1825, as follows:

> "The accusation in due and solemn form is as indispensable as the conviction. The bill of indictment is sent or delivered to the Grand Jury, who after hearing all the evidence adduced by the Commonwealth, decide whether it is a true bill or not. If they find it so, the Foreman of the Grand Jury endorses on it 'A True Bill,' and signs his name as Foreman, and then the bill is brought into Court by the whole Grand Jury, and in open Court it is publicly delivered to the Clerk, who records the fact. It is necessary that it be presented publicly by the Grand Jury, that is the evidence required by Law to prove that it is sanctioned by the accusing body, and until it is so presented by the Grand Jury, with the endorsement aforesaid, the party charged by it is not indicted, nor is he required or bound to answer any charge against him which is not so presented.
>
> "The circumstances that the bill is endorsed a true bill and signed by David Campbell, foreman, affords no record proof that the bill was found by any Grand Jury, nor particularly by this Grand Jury. That gentleman might have been frequently the foreman of other Grand Juries in the same Court, and, though we know as men that he would not sign any paper as foreman without being really so, yet as Judges we must require record proof that he was authorized by the Grand Jury of which he was Foreman to make the endorsement now before us, and that he presented it in their presence in open Court as the accusation against this individual."

We see that it is essential to the validity of a conviction that the entire grand Jury return an indictment into open

Court in the presence of the Judge, and that the fact be recorded.

It could not be presented by the foreman or the whole grand jury to the Clerk of the Court in the absence of the Judge.

The Fourth Circuit in *Kenigar* quoted with approval the following from *State* v. *Bordeau*, 93 N. C. 563:

> "We believe a loose practice prevails in many of our Courts with respect to the returns of bills of indictment into Court by the Grand Jury. It is often the case that bills are carried into Court by the foreman alone, but this is a practice to be condemned because it is not the legal mode of proceeding. The law requires that the Grand Jury should make their returns in a body that the Court may see that they as a body assent to the returns made."

The Fourth Circuit further said in *Kenigar* v. *U. S.*, *supra*, as follows:

> "The Foreman is not the representative of the Grand Jury. He is authorized to speak for it in its presence, when called on by the Court to say whether the Grand Jury has any presentments to make. Any other rule would put it in the power of an individual who happened to be foreman of the Grand Jury to gratify personal or other malice by presenting in the form of an indictment for an infamous offense a person innocent of all crime, and subject him to the annoyance, expense, and infamy attendant upon such accusation.
>
> "It is not enough to say that such a thing is improbable; that it is possible is sufficient reason for adhering to those rules which have the sanction of time and immemorial usage."

The docket entry of July 12, 1960, in the case of the within-appellant shows the following:

> "Indictment returned and filed at Newport News and transferred to Richmond." (Petitioner's Appendix p. 11 filed in Court below.)

The entry of record in the within case appears from the transcript of the Court reporter, which is to wit: "United States of America against Leroy Alphonso Haith, *illicit distillery* a true bill, Signed E. N. Islen, foreman."

While it is held in *U. S. v. Glasser*, 315 U. S. 60 that no set form of phraseology is required to show that the indictment was returned into open Court by the entire grand jury, yet such finding must appear of record. Such finding does not appear in the case of the petitioner.

The character of the offense for which the petitioner was tried and convicted is irreconcilably in conflict with the offense of record as recorded by the official Court Reporter.

State v. Heaton, 23 W. Va. 773. Cited in *Kenigar v. U. S.*, *supra*, says:

> "While it is absolutely necessary that an entry should be made in the record book if the finding by a grand jury, it being held to be just as essential as the entry on the record book of the verdict or finding of a petty jury still such entry need not describe the offense, for which the accused has been indicted, in any but the most general manner as "a felony" or "a misdemeanor." If however there is added to this general description of the offense; as is generally done if the offense is a common Law offense, but which ought not to be done, if it is a statutory offense, a description of the character of the offense, and this description of the character of the offense should not be accurate, it would not be a fatal error, unless the description was irreconcilably in conflict with that contained in the indictment, the office of this entry on the record book not being to identify the

exact crime with which the accused stands charged, but merely to show that he has been openly and publicly indicted in open Court by the Grand Jury."

CONCLUSION

It is respectfully submitted for the foregoing reasons, that the Court below so far departed from the accepted and usual course of judicial proceedings that its judgment is manifestly erroneous and petitioner prays that a writ of certiorari be herein awarded him and that the final order of the United States Court of Appeals for the Fourth Circuit be reversed, and that his convictions and sentence be set aside and annulled.

Respectfully,

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